INTERIOR BOARD OF INDIAN APPEALS

Edward Whiteskunk; William Blind, Vinita Sankey, Kent Stonecalf, and James Pedro v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

43 IBIA 96 (06/07/2006)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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EDWARD WHITESKUNK; WILLIAM BLIND, VINITA SANKEY, KENT STONECALF, and JAMES PEDRO, Appellants,	:	Order Dismissing Appeals in Part and Affirming Decision in Part
v.	:	Docket Nos. IBIA 04-137-A 04-138-A
ACTING SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	June 7, 2006

Edward Whiteskunk (No. IBIA 04-137-A) and William Blind, Vinita Sankey, Kent Stonecalf, and James Pedro (No. IBIA 04-138-A) seek review of a July 1, 2004 decision of the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director's decision affirmed a decision by the Superintendent, Concho Agency (Superintendent) instructing the Election Board of the Cheyenne-Arapaho Tribes of Oklahoma (Tribes) to conduct an election to allow the registered voters of Cheyenne District #4 to decide whether to recall Edward Whiteskunk. The Regional Director's decision also found an appeal from a second decision by the Superintendent — declining to accept documents approved or signed by Whiteskunk — to be moot. For the reasons discussed below, the Board of Indian Appeals (Board) finds that the issues related to both decisions by the Superintendent were moot when the Regional Director issued his decision, and therefore we dismiss in part and affirm in part.

Factual Background

The Cheyenne-Arapaho Tribes of Oklahoma are a federally recognized Indian tribe organized pursuant to their Constitution, which was approved by the Secretary of the Interior on April 3, 1974 and ratified by the Tribes on April 19, 1975. Under the Constitution, the Tribal Council is the governing body of the Tribes, consisting of all enrolled members at least eighteen years of age. Constitution and By-Laws, Art. I, sec. 2; Art. IV, sec. 1. The Business Committee, which consists of eight elected members, is a subordinate government body that conducts the Tribes' daily affairs. Id., Art. I, sec. 3; Art. IV, secs. 2-5. The Tribes' Election Board is composed of eight members of the Tribal

Council and is charged with establishing rules governing the election of committeemen and referendum voting. Id., Art. I, sec. 6; Art. V, Sec. 2. In order for the Business Committee or the Election Board to conduct tribal business, the Constitution specifies that a quorum of at least five members of each group be present. Id., Art. I, sec. 5a.

The Tribes' Constitution establishes the process for conducting recall elections. Article IX, section 2 provides:

> The Cheyenne-Arapaho Business Committee shall, upon receipt of a valid petition signed by one-third (1/3) of the registered voters of any one district requesting the recall of a representative from that district, direct the election board to conduct an election within sixty-five (65) days from the date of receiving the petition to determine if, in fact, such representative shall be recalled. * * * In the event the committee fails to act within sixty-five (65) days, the Superintendent of the Concho Agency, his replacement, successor, or counterpart may so instruct the board.

The Tribes' Election Board rules provide a detailed process governing the registration, certification, and validation of recall petitions.

The appellants in this case are members and officers of the Tribes' 33rd Business Committee (Business Committee). Appellant Whiteskunk was the elected Business Committee representative from Cheyenne District #4 and was appointed by the Committee to be its Treasurer. This appeal involves the controversy surrounding a petition circulated by tribal member Imogene Herndon to recall Whiteskunk, and the subsequent recall election. 1/

Herndon presented a petition calling for the recall of Whiteskunk to two Election Board members on April 25, 2003. In a memorandum dated June 17, 2003 Election Board Chairperson Marcianna Jacobs informed Business Committee Chairman Robert Tabor, Business Manager Ida Hoffman, and Herndon that the recall petition was received by the Election Board on April 25, 2003 and that on April 28, 2003 the Election Board convened and certified the petition for circulation. The June 17, 2003 memorandum also

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1/ It appears that conflict within the Business Committee is nothing new and that there has been a long-standing battle between two factions of the Committee. See Tabor v. Acting Southern Plains Regional Director, 39 IBIA 144 (2003) (upholding Regional Director's decision that four out of eight Business Committee members cannot conduct tribal business because there is no quorum as required under the Constitution).

stated that Herndon had until June 27, 2003, 60 days from the date of certification, to petition for recall and to submit the petition to the Business Committee Chairman. In a memorandum dated June 26, 2003, four members of the Business Committee directed the Election Board to "proceed and continue the process on the recall petition" and stated that their direction was a "direct order of the majority of the 33rd Business Committee." In another memorandum dated June 26, 2003, two Election Board members informed Herndon that the Election Board had received her petition. In a memorandum dated June 27, 2003, Business Manager Hoffman notified Herndon that she was accepting the petition. The memorandum stated that her office had been notified that nobody from the Chairman's chambers had been present to receive the petition and that the petition was received instead by James Pedro, the Business Committee representative from Arapaho District #2. 2/ On that same day, the Tribes' Enrollment Director issued a memorandum to Herndon verifying that all of people who had signed the petition were validly enrolled tribal members.

On July 1, 2003, Business Manager Hoffman issued a memorandum to Business Committee Chairman Tabor stating that Herndon's petition had been received on June 27, 2003 by Business Committee members Pedro and Stonecalf and verified by the Enrollment Office that same day. The memorandum further stated that the Chairman had only five days — until July 2, 2003 — to convene a special meeting of the Business Committee to determine whether the petition was valid. However, in another memorandum issued to Tabor on July 1, 2003, Election Board Chairperson Jacobs took the position that the Whiteskunk recall petition had not been properly submitted because the original petition had not been submitted to the Business Committee Chairman as required by the Election Board rules. In addition, the memorandum stated that the June 26, 2003 memorandum from the four Business Committee members was invalid because the four members who signed the memorandum did not constitute the Constitutionally required quorum for Business Committee actions and because the memorandum did not comply with Article IV, section 4 of the Constitution, which requires all Business Committee action to be by ordinance or resolution. Apparently, on July 10, 2003, five members of the Election Board held a special meeting and voted to return the recall petition to Herndon. In a memorandum dated July 17, 2003, Election Board Chairperson Jacobs informed Business Committee Chairman Tabor that the petition had been returned to Herndon "to begin the proper process."

2/ The administrative record submitted to the Board reflects that Business Committee member Kent Stonecalf, Representative from Cheyenne District #3, also received the petition.

At the same time that members of the Business Committee and the Election Board were taking conflicting positions over Herndon's recall petition, the same issues were being litigated in the District Court of the Cheyenne-Arapaho Tribes. On July 9, 2003, the District Court issued an order in Herndon v. Tabor, CNA-CIV-03-56, finding that Herndon's recall petition was valid and directing the Election Board to begin the recall procedure for Whiteskunk. Two days later, on July 11, 2003, the District Court issued a clarification of its July 9, 2003 order, again stating that the recall petition was valid and ordering the Election Board to begin the recall process.

Notwithstanding her success in tribal court, and apparently concerned that the Election Board would not comply with the court orders, on July 18, 2003, August 20, 2003, and September 9, 2003, Herndon sent letters to the Superintendent stating that more than sixty-five days had passed since she submitted her recall petition to the Business Committee and requesting that, consistent with Article IX, section 2, of the Tribes' Constitution, the Superintendent step in and instruct the Election Board to conduct a recall election for Whiteskunk.

On October 8, 2003, the Superintendent issued a letter to Election Board Chairperson Jacobs, invoking her authority under Article IX, section 2, of the Tribes' Constitution and directing the Election Board to conduct a recall election. The Superintendent's letter noted that the creation and existence of the tribal court may have lessened BIA's responsibility to act under this provision of the Constitution, and also recognized that BIA's role is discretionary. The Superintendent concluded, however, that the Business Committee and the tribal court had not protected the Constitutional rights of the tribal members, and directed the Election Board to conduct a recall election.

In a letter dated October 22, 2003, the Election Board responded to the Superintendent's letter, stating that the Election Board had determined that the recall petition was invalid. On November 17, 2003, however, Business Committee Chairman Tabor directed the Election Board to proceed with the recall election.

In the meantime, the Cheyenne-Arapaho District Court continued to address the controversy surrounding the Whiteskunk recall petition. In two related cases, the District Court issued various orders that, inter alia, directed Whiteskunk to turn over tribal funds and submit account records 3/ and prohibited Whiteskunk from expending tribal funds

3/ Tabor v. Whiteskunk, CNA-CIV-03-111 (Dec. 1, 2003).

until completion of the recall process. 4/ On December 10, 2003, the District Court issued yet another order, stating that the "prior rulings of this court are to be obeyed" and ordering ballots for the recall election to be mailed out "at once." 5/

Despite the District Court's rulings, on December 6, 2003, the Business Committee passed Resolution No. 120603R166, which recognized and affirmed the Election Board's determination that the Whiteskunk recall petition was invalid under the Constitution, and resolving that the Business Committee would not direct the Election Board to conduct a recall election.

On December 19, 2003, the Superintendent issued a second letter to Election Board Chairperson Jacobs stating that the Whiteskunk recall petition was valid and again ordering the Election Board to conduct a recall election. On December 23, 2003, the Superintendent informed the Business Committee that she was refusing to accept, "at this time," documents approved or signed by Whiteskunk as the committee's Treasurer in accordance with the District Court's December 11, 2003 temporary restraining order and injunction prohibiting Whiteskunk from expending tribal funds "until the recall process is completed." Herndon v. Whiteskunk, CNA-CIV-03-122 (Dec. 11, 2003).

On January 9, 2004, Whiteskunk filed an appeal from the Superintendent's December 19, 2003 and December 23, 2003 decisions. An attorney purportedly representing the Business Committee filed an Answer of Interested Party.

While the appeal was pending, however, the Election Board held a recall election in compliance with the District Court's December 10, 2003 order directing that recall election ballots be mailed out immediately. The results of the election, which was held on February 2, 2004, were 77 votes in favor of removing Whiteskunk and 66 votes in favor of retaining Whiteskunk. In a memorandum dated February 4, 2004, the Election Board informed the Business Committee, the Superintendent, Whiteskunk, and the Cheyenne-Arapaho District Court of the results of the election. The memorandum stated that because the Election Board had not received a challenge to the results within 24 hours, as required by Election Board rules, the Election Board was officially certifying the results of the recall election and officially declaring Whiteskunk's position to be vacant.

4/ Herndon v. Whiteskunk, CNA-CIV-03-122 (Dec. 11, 2003).

5/ Herndon v. Election Board Members, CNA-CIV-03-65 (Dec. 10, 2003).

On May 18, 2004, the Supreme Court of the Cheyenne-Arapaho Supreme Tribes affirmed the District Court's July 9, 2003 and July 11, 2003 decisions, which had determined that the recall petition was valid and had ordered the Election Board to conduct the recall election.

On July 1, 2004, the Regional Director issued the decision now on appeal, affirming the Superintendent's decision to direct the Election Board to conduct a recall election. The Regional Director determined that the Superintendent had properly exercised her authority under the Tribes' Constitution and that her own determination as to the validity of the recall petition was "required * * * as an element of her [Constitutional] authority." Regional Director's Decision at 4. The Regional Director next concluded that the issue of whether the Superintendent had properly refused to recognize Whiteskunk's signature as Treasurer of the Business Committee was moot because the Supreme Court had upheld the District Court's decisions ordering the recall election and because Whiteskunk had been recalled in the February 2, 2004 election. Id.

On August 3, 2004, the Board received two separate but identical notices of appeal of the Regional Director's decision — one from Whiteskunk and one from William Blind, Vinita Sankey, Kent Stonecalf, and James Pedro. On August 4, 2004, the Board consolidated the two appeals. Appellant Whiteskunk (hereafter, Appellant) filed an Opening Brief and the Cheyenne and Arapaho Tribes of Oklahoma filed an Answer of Interested Party. The Regional Director declined to file a brief. 6/

Discussion

On appeal, Appellant argues that the recall petition was invalid and therefore the February 2, 2004 recall election was also invalid. Appellant argues that the Regional Director's decision failed to recognize the Constitutional and Election Board rule violations that occurred and improperly interfered with the authority of the Tribes' Business Committee and Election Board. Appellant also argues that the recall election process was "tainted" by violations of the Indian Civil Rights Act, 25 U.S.C. §§ 1302 et seq. (ICRA).

In response, the Tribes argue that the Tribal Supreme Court's May 18, 2004 decision precludes the Board from considering this appeal under the doctrine of res judicata because this appeal is based on the same facts and presents the same issues already decided against the Business Committee by the Tribal Supreme Court. The Tribes further contend that the Board should abstain from hearing Appellant's claims based on "federal policies

6/ No brief was filed by William Blind, et al.

upholding the ability of the Tribes to govern themselves and interpret their own laws, and abstaining from interfering in intra-tribal factional disputes." Tribes' Brief at 6. The Tribes also argue that Appellant is barred from claiming that he has been denied the due process guaranteed to him under the ICRA because Appellant makes this argument for the first time on appeal and because Appellant could have raised this issue in the Tribal District Court and Supreme Court proceedings, but failed to do so.

The Regional Director's July 1, 2004 decision addresses two specific actions taken by the Superintendent: (1) an order to conduct a recall election, and (2) a decision not to accept documents signed or approved by Appellant, pursuant to the tribal district court's temporary restraining order and injunction against Appellant. Appellant challenges the Regional Director's decision with respect to both actions taken by the Superintendent, although Appellant's arguments focus largely, if not entirely, on the validity of the recall petition. The Board concludes that it need not delve into the merits of Appellant's arguments regarding the recall petition because that issue is moot, and was already moot when the Regional Director issued his decision.

The doctrine of mootness in Federal courts is based on the case-or-controversy requirement set forth in the Article III of the United States Constitution. Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274 (2005). Although the Board is not bound by this requirement, in the interest of administrative economy, it has consistently followed the same principle of declining to consider moot cases. Id. Mootness may arise in various contexts, but each is based on the requirement that an active case or controversy be present at all stages of litigation. Id., and cases cited therein. See also Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308, 312 (2005) ("Mootness is 'the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'") (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (internal quotations and citations omitted)). A case is therefore moot when nothing turns on the outcome of an appeal. See Brown v. Navajo Regional Director, 41 IBIA 314, 318 (2005), and cases cited therein.

Despite Appellant's lengthy arguments to the Board about the validity of the recall petition, the simple fact is that the Cheyenne-Arapaho Supreme Court separately resolved that issue with its May 18, 2004 decision, and independently upheld the District Court orders to the Tribe's Election Board to conduct a recall election. By the time the Regional Director issued his decision, there was therefore no longer any active case or controversy with respect to the Superintendent's order to conduct a recall election. The Cheyenne-Arapaho Supreme Court had acted as an independent forum to resolve the tribal dispute and the recall election had been held in compliance with the tribal court orders. Vacating

the Regional Director's decision now would have absolutely no impact because this appeal is limited to reviewing BIA's actions, and neither the Superintendent nor the Regional Director purported to review the tribal court decisions ordering the recall election. The relief that Appellant seeks against BIA would not change the tribal court orders and could not "undo" the recall election held in compliance with those orders. Thus, "nothing turns on the outcome" of these claims, Brown, 41 IBIA at 318, and we must dismiss them as moot. Because the Tribal Supreme Court had already resolved the recall petition issue and the recall election had been held at the time the Regional Director issued his decision, the Regional Director should have dismissed as moot Appellant's challenge to the Superintendent's December 19, 2003 decision ordering a recall election. Therefore, the portion of the Regional Director's decision affirming the Superintendent's decision shall be given no effect.

With respect to the Superintendent's decision refusing to accept documents approved or signed by Appellant as Treasurer of the Business Committee, the Regional Director's decision concluded that "the issue is now moot" because Appellant was recalled by the February 2, 2004 election and because the Cheyenne-Arapaho Supreme Court had upheld the District Court's decisions ordering the recall election. Regional Director's Decision at 4.

We agree with the Regional Director's conclusion that this issue is moot, but based on narrower grounds to avoid unnecessarily addressing the results of the recall election. The Superintendent's December 23, 2003 decision was explicitly temporary in nature (refusing to accept documents approved or signed by Appellant "at this time"), and based on compliance with the tribal court's temporary restraining order and injunction. Similarly, the tribal court order enjoined Appellant on a temporary basis, i.e., "until the recall process is completed." Herndon v. Whiteskunk, CNA-CIV-03-122 (Dec. 11, 2003). As we have already noted, the Election Board conducted the recall election in compliance with an independent tribal court order and certified the results when no challenges were filed in a tribal forum. Appellant has failed to show that either the Superintendent's decision or the court's temporary restraining order are still in effect. While the results of the recall election may provide the basis for a new decision not to accept documents approved or signed by Whiteskunk, the Superintendent's December 23 decision was more limited, and we conclude that Appellant's claims regarding that decision are moot. We therefore affirm the Regional Director's conclusion on this issue.

We turn finally to Appellant's claim that the alleged violations of tribal law with respect to the recall petition violated the ICRA's provision prohibiting Indian tribes from depriving "any person of liberty or property without due process of law." 25 U.S.C.

§ 1302(8). The Board has held in the past that "BIA has the authority and responsibility to decline to recognize the results of a tribal election when it finds that a violation of ICRA has tainted the election results." United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, 22 IBIA 75, 83 (1992). The Board's responsibility, however, "does not relieve tribal members of their obligation to exhaust their tribal remedies before seeking relief from BIA." Torres v. Acting Albuquerque Area Director, 28 IBIA 229, 242 (1995) (quoting Mosay v. Minneapolis Area Director, 27 IBIA 126, 131 (1995)).

Here, Appellant raises his ICRA claims for the first time in his appeal before the Board. The Board has a well-established rule that it does not consider issues raised for the first time on appeal. State of South Dakota and Bennett County, South Dakota v. Acting Great Plains Regional Director, 39 IBIA 301, 305 (2004); County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 174 (2002). On this basis, the Board declines to consider Appellant's ICRA claims. We further note that Appellant makes no claim that he raised his ICRA claims before any tribal forum, although he had the opportunity to do so before the Tribal Supreme Court. The Board therefore also declines to consider Appellant's ICRA claims for failure to exhaust tribal remedies. See Torres, 28 IBIA at 242. Accordingly, the Board will not consider Appellant's allegations of ICRA violations in this appeal and dismisses these claims for lack of jurisdiction.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses as moot Appellant's claims related to the Superintendent's order to conduct a recall election; affirms that portion of the Regional Director's decision concluding that Appellant's claims related to the Superintendent's decision not to accept documents signed or approved by Appellant are moot; and dismisses Appellant's claims under ICRA for lack of jurisdiction.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge